

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL (No. 5) 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Minister for Immigration and Ethnic Affairs,  
Senator the Hon. Nick Bolkus)



## MIGRATION LEGISLATION AMENDMENT BILL (No. 5) 1995

### OUTLINE

#### Overview

1 The Migration Legislation Amendment Bill (No. 5) 1995 ("the Bill") seeks to amend the *Migration Act 1958* ("the Migration Act") to:

- further implement the Government's response to recommendations of the Joint Standing Committee on Migration ("JSCM") Report on Asylum, Border Control and Detention by providing the Minister for Immigration and Ethnic Affairs ("the Minister") with a discretion to determine that a person is an "eligible non-citizen"
  - this will enable the release from detention of certain persons who have been in detention for more than six months after an application for a protection visa has been made;
- temporarily extend the duration of the Migration Agents Registration Scheme ("MARS");
- provide greater flexibility in relation to the questions asked on passenger cards;
- make certain technical amendments consequent upon the repeal of the *Migration (Delayed Visa Applications) Tax Act 1992*; and
- make other technical amendments.

2 By a discrete amendment the Bill also seeks to amend the *Immigration (Education) Act 1971* to provide that the Commonwealth is not obliged to provide, or arrange the provision of, any tuition in an approved English course if the person holds a visa granted because the person satisfied paragraph 816.721(1)(a) or 818.721(1)(a) of the Migration (1993) Regulations.

3 By a further discrete amendment the Bill seeks to retrospectively repeal the *Migration (Delayed Visa Applications) Tax Act 1992* ("the Tax Act") from the date of its commencement: 1 September 1994.

#### Amendments relating to eligible non-citizens

4 The JSCM Report on Asylum, Border Control and Detention made a number of recommendations in regard to the release of unauthorised arrivals. Various recommendations have been implemented. This Bill seeks to further implement recommendations numbers 10 and 11 by providing the Minister with a non-delegable and non-compellable discretion to declare a person to be an eligible non-citizen if:

- the non-citizen was an unlawful non-citizen when he or she entered the migration zone;
- the non-citizen made a valid application for a protection visa after he or she arrived in Australia;
- the non-citizen has been in immigration detention for a period of more than 6 months after the application for a protection visa was made;
- the Minister has not made a primary decision in relation to the application for a protection visa; and
- the Minister thinks that the determination would be in the public interest.

5 Pursuant to section 14 of the Migration Act a person described in paragraph 4 above is an unlawful non-citizen when he or she entered the migration zone. Section 189 provides that such persons must be detained and section 196 provides that they cannot be released from detention until removed from Australia or granted a visa.

6 The bridging visa mechanism allows the release of unlawful non-citizens who have been detained. Pursuant to section 73 of the Migration Act a person must be an eligible non-citizen to be granted a bridging visa. Section 72 defines an eligible non-citizen as a non-citizen who has been immigration cleared or is in a prescribed class of persons.

7 The proposed amendment expands the definition in section 72 to include a person determined by the Minister to be an eligible non-citizen. This will enable the Minister to determine that the unlawful non-citizen who is being detained is an eligible non-citizen and as a consequence the person will be able to apply for a bridging visa. (Appropriate amendments to the Migration Regulations will be made to ensure that such a person may be eligible for the grant of the bridging visa subject to meeting the criteria for the relevant subclass). Once a bridging visa has been granted the person will then be able to be released from detention.

8 The proposed amendment provides the Minister with the power to exercise a non-delegable and non-compellable discretion to determine that a person is an eligible non-citizen if the Minister thinks that it is in the public interest to do so. In exercising this power, the Minister must table a statement in Parliament setting out the determination and the reasons for it, referring particularly to the Minister's reasons for thinking that his or her actions are in the public interest.

## **Migration Agents Registration Scheme ("MARS")**

9 Part 3 of the Migration Act provides a comprehensive scheme to regulate the conduct of migration agents. The JSCM is currently undertaking a review of MARS. The Committee's report is expected in April 1995. At this stage, it is too early to anticipate the likely content of the JSCM's recommendations and what the Government's response will be. The proposed one year extension of time (until 21 September 1996) for the operation of the present provisions will allow the Government time to consider and respond to the JSCM Report and provide time for the passage of any relevant legislation.

## **Passenger Cards**

10 Section 506 of the Migration Act currently provides matters that are to be covered in questions asked on a passenger card. This amendment allows greater flexibility with passenger cards and will assist the streamlining of entry of passengers into the migration zone.

## **Amendments to the Immigration (Education) Act 1971**

11 The current legislation requires the Commonwealth to provide English language tuition to holders of certain types of stay visa.

12 The proposed amendment provides that the Commonwealth is not obliged to provide, or arrange for the provision of, any tuition in an approved English course to a person if the person holds a visa granted because the person satisfied paragraph 816.721(1)(a) or 818.721(1)(a) of the Migration (1993) Regulations.

## **Repeal of the *Migration (Delayed Visa Applications) Tax Act 1992***

13 The Tax Act was introduced at the same time as the *Migration Reform Act 1992* as part of an overall package of measures designed to enhance the effectiveness of Australia's control of its borders and the regulation of the entry, presence, detention and removal of people who do not establish entitlements to remain in Australia.

14 The Tax Act imposes a tax on an application for a visa made by an unlawful non-citizen who has been unlawfully present in Australia for a period, or periods adding up to, at least 12 months. The tax is not imposed:

- . on an application for a visa to be granted when the applicant is out of Australia;
- . on an application for a protection visa or a bridging visa;
- . on an application if the visa is not granted;

if the applicant leaves Australia without the visa being granted and the visa is not granted after leaving; or

if liability for the tax is waived.

15 The amount of tax imposed increases with each year the person remains unlawfully in Australia before making an application for visa. The minimum amount of tax is at least \$3,000 per year (indexed to 1993-94) for each year that the person has been unlawful at the time of the application for a visa.

16 As indicated in the then Minister's Second Reading speech, the tax imposed by the Tax Act was intended to serve as an incentive for overstayers to come forward at an early stage to regularise their status. It was not intended to raise revenue. Its prime objective was to deter people from remaining unlawfully in Australia for long periods of time before applying for a visa. The number of people liable for the tax is minimal.

17 It has subsequently become apparent that these objectives are already being achieved through other current legislative and procedural mechanisms.

18 Repeal of the Tax Act is proposed from the date of commencement, 1 September 1994. This ensures that no person is liable or will have been liable to pay the tax. In the event that any tax has been collected there is provision for the sum of the tax paid to be returned to the person who has paid the tax.

## FINANCIAL IMPACT STATEMENT

19 The amendments to section 506 of the Migration Act will have no financial impact as the existing stock of passenger cards can be used. When new cards are printed there will be negligible cost impact in the redesign of the cards.

20 As a result of the amendments relating to the extension of the Migration Agents Registration Scheme, the existing running cost of the present scheme will continue for the additional 12 month period.

21 The amendments to the *Immigration (Education) Act 1971* will result in the English language course being unavailable to certain persons. The extent of savings is difficult to estimate as it depends on the amount of utilisation of the scheme that would have otherwise occurred.

22 The repeal of the *Migration (Delayed Visa Applications) Tax Act 1992* is expected to have a negligible financial impact. As indicated by paragraph 16 above, the Tax Act was not primarily intended as a revenue raising measure.

## **MIGRATION LEGISLATION AMENDMENT BILL (No. 5) 1995**

### **NOTES ON INDIVIDUAL CLAUSES**

#### **Clause 1                      Short Title**

1       This clause provides that the Act may be cited as the *Migration Legislation Amendment Act (No. 5) 1995*.

#### **Clause 2                      Commencement**

2       This clause details when the various provisions of the Act are to commence. The clause provides that the Act will commence on the day it receives the Royal Assent, subject to the following exceptions:

- Items 2, 3, 4, 6, 7, 11 and 12 of Schedule 1 are taken to have commenced immediately after the commencement of section 83 of the *Migration Legislation Amendment Act 1994*.
- Item 17 of Schedule 1 is taken to have commenced immediately after the commencement of the *Migration (Delayed Visa Applications) Tax Act 1992*.
- Item 19 of Schedule 1 commences on the day of the Royal Assent except if this Act receives the Royal Assent after the *Migration Legislation Amendment Act (No. 4) 1995* receives the Royal Assent. If the *Migration Legislation Amendment Act (No. 4) 1995* receives the Royal Assent first then Item 19 is repealed on that day.

#### **Clause 3                      Schedule 1**

3       This clause provides that the Acts specified in Schedule 1 are amended in accordance with the applicable items in that Schedule and the other items in Schedule 1 have effect according to their terms.

### **SCHEDULE 1**

#### ***IMMIGRATION (EDUCATION) ACT 1971***

##### **Item 1                      Certain persons not entitled to tuition**

4       Subitem (1) provides that despite section 4C of the *Immigration (Education) Act 1971*, the Commonwealth is not obliged to provide, or arrange for the provision of, any tuition in an approved English course to a person if the person holds a visa granted because the person satisfied paragraph 816.721(1)(a) or 818.721(1)(a) of the Migration (1993) Regulations.

5 Subitem (2) provides that if immediately before the commencement of this item, the Commonwealth had an obligation under the *Immigration (Education) Act 1971* to a person covered by subitem (1), that obligation ceases at the commencement of this item.

### **MIGRATION ACT 1958**

#### **Item 2 Subsection 5(1) (definition of "visa tax")**

6 This item omits the definition of "visa tax".

#### **Item 3 Subsection 64(4)**

7 This item omits subsection 64(4).

#### **Item 4 Subparagraph 65(1)(a)(iv)**

8 This item omits "any visa tax" from the subparagraph.

9 Items 2, 3 and 4 are amendments consequential on the repeal of the *Migration (Delayed Visa Applications) Tax Act 1992*.

#### **Item 5 Section 72**

10 This item inserts paragraph 72(1)(c) which allows the Minister to make a determination that a non-citizen is an eligible non-citizen.

11 This item inserts subsection 72(2) which provides that the Minister may make a determination under paragraph 72(1)(c) that the person is an eligible non-citizen if:

- the non-citizen was an unlawful non-citizen when he or she entered the migration zone;
- the non-citizen made a valid application for a protection visa after he or she arrived in Australia;
- the non-citizen has been in immigration detention for a period of more than 6 months after the application for a protection visa was made;
- the Minister has not made a primary decision in relation to the application for a protection visa; and
- the Minister thinks that the determination would be in the public interest.

12 This item inserts subsection (3) which provides that the power to make a determination may only be exercised by the Minister personally.

**13** This item inserts subsection (4) which provides that when a determination is made the Minister must cause to be laid before each House of Parliament a statement that:

- . sets out the determination; and
- . sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

**14** This item inserts subsection (5) which provides that the statement for each House of the Parliament should not include:

- . the name of any non-citizen who is the subject of the determination, or any information which may identify the non-citizen; or
- . the name of any other person connected with the matter or any information which may identify them, where the Minister believes it is not in the public interest that their name be published.

**15** This item inserts subsection (6) which provides that the statement must be laid before each House of Parliament within 15 sitting days of that House after:

- . if the determination is made between 1 January and 30 June (inclusive) in a year - 1 July in that year; or
- . if the determination is made between 1 July and 31 December (inclusive) in a year - 1 January in the following year.

**16** This item inserts subsection (7) which provides that the Minister does not have a duty to consider whether to make a determination under paragraph 72(1)(c) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or any other person, or in any other circumstances.

#### **Item 6                      Paragraph 84(3)(b)**

**17** This item amends paragraph 84(3)(b) by omitting "valid permanent visa" and substituting "permanent visa that is in effect". This amendment is technical in nature and ensures that the correct terminology is being used.

#### **Item 7                      Paragraph 222(7)(a)**

**18** This item omits reference to "deportees" (wherever occurring) and substitutes "non-citizen's". This amendment is technical in nature and ensures that the correct terminology is being used.



**Item 8                      Division 7 of Part 3 (heading)**

19    This item omits "3 years" and substitutes "4 years" in the heading of this Part.

**Item 9                      Subsection 333(1)**

20    This item omits "3 years" and substitutes "4 years" as the period when Part 3 of the Migration Act will cease to be in force. The four year period will end on 21 September 1996.

**Item 10                    Subsection 333(4)**

21    This item omits "2 years" and substitutes "3 years" after commencement of Part 3 of the Migration Act as the date after which, if application fees and renewal fees are paid, the regulations may provide for their refund. The three years will end on 21 September 1995.

22    Items 8, 9 and 10 are related to the extension of MARS which will expire on 21 September 1996.

**Item 11                    Subsection 424(1)**

23    This item omits the reference to section 417 and substitutes reference to section 418. This amendment is technical in nature and ensures that the correct cross-reference is being used.

**Item 12                    Section 451**

24    This item omits the reference to section 417 and substitutes reference to section 418. This amendment is technical in nature and ensures that the correct cross-reference is being used.

**Item 13                    Paragraph 475(2)(e)**

25    This item omits paragraph 475(2)(e) and inserts a new paragraph. The new paragraph reinserts the provisions of the omitted paragraph and inserts reference to paragraph 72(1)(c). Paragraph 72(1)(c) is inserted by this Bill.

**Item 14                    Subsection 506(3)**

26    This item omits reference to "are to include" and substitutes "may include, but are not limited to,".

**Item 15                    Subsection 506(3)**

27    This item inserts after "about", "any or all of the following".

**Item 16                      Subsection 506(3)**

28     This item deletes "and" wherever it occurs in this subsection.

29     The combined effect of items 14, 15 and 16 is to remove the compulsion to ask questions relating to all the matters provided in subsection 506(3) of all people completing the passenger card. It also allows matters not specified in subsection 506(3) to be covered in questions on the passenger card.

***MIGRATION (DELAYED VISA APPLICATIONS) TAX ACT 1992***

**Item 17**

30     This item repeals the *Migration (Delayed Visa Applications) Tax Act 1992*. The repeal is effective from the date it came into operation.

**Item 18                      Transitional - cancellation of debts and refunds of tax paid**

31     Subitem 1 provides that a debt that may have arisen under the operation of the Tax Act ceases to be payable on the commencement of this item.

32     Subitem 2 provides that if any tax has been paid under the Tax Act the person who has paid the tax is entitled to be paid by the Commonwealth an amount equal to the amount they have paid. The money is to be appropriated from the Consolidated Revenue Fund.

***MIGRATION LEGISLATION AMENDMENT ACT (No. 4) 1995***

**Item 19                      Item 7 of the Schedule**

33     This item omits Item 7 of the Schedule of the *Migration Legislation Amendment Bill (No. 4) 1995*. This provision is necessary because this Bill and the *Migration Legislation Amendment Bill (No. 4) 1995* are both presently before Parliament and it is not clear which Bill will receive the Royal Assent first. This item ensures that the amendment can be made no matter which Bill commences first.











